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Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

In the Matter of Adjustment of
Rates and Terms for the Digital
Performance of Sound Recordings

Docket No. 2001-1 CARP DSTRA 2

Docket No. 2001-2 CARP DTNSRA

**JOINT COMMENTS OF XM SATELLITE RADIO, INC. AND SIRIUS
SATELLITE RADIO INC.**

XM Satellite Radio, Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius"), the two pre-existing satellite digital audio radio services, hereby jointly submit these comments in response to the Notice of Inquiry issued by the Copyright Office on November 20, 2001, 66 Fed. Reg. 224 (2001)(the "NOI"). The NOI was prompted by a petition by Music Choice requesting that the Copyright Office consolidate the potential proceeding for new subscription services, such as Music Choice's Backstage Pass, (Docket No. 2001-2 CARP DTNSRA)("New Subscription Services CARP") with the proceeding for the pre-existing satellite digital audio radio services and the pre-existing subscription services (Docket No. 2001-1 CARP DSTRA 2)("Pre-existing Services CARP"). The Copyright Office seeks comments regarding the advisability of such a

consolidation, and, in particular, whether both dockets can be handled efficiently and effectively by a single CARP and the advantages, if any, of convening separate CARPs.¹

XM and Sirius oppose the inclusion of any new subscription services in the Pre-existing Services CARP and also oppose consolidation of any New Subscription Services CARP with the upcoming Pre-existing Services CARP. There is a substantial risk that consolidation would cause unnecessary confusion and complexity in a proceeding that is already likely to be confusing and complex. The Library has stated: "If, in the view of the Library, a consolidated proceeding will be so complicated and involve significantly larger amounts of testimony and evidence than a single proceeding, then consolidation is not an option." Order, In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket Nos. 99-6 CARP DTRA, 2000-3 CARP DTRA 2 at 4 (December 4, 2000). Consolidation is "not an option" here precisely because such complications would result.

Section 114 of the Copyright Act draws a clear distinction between the procedures and standards applicable to the pre-existing subscription services and new subscription services. A Pre-existing Services CARP will determine rates and terms for a five year license period and apply the fee standard set forth in §801(b)(1). 17 U.S.C. § 114(f)(1). There is no obligation to set a minimum fee. By contrast, any New Subscription Services CARP will determine rates and terms for a two year license period, and will apply a "willing buyer/willing seller" fee standard with an obligation to set a minimum fee. 17 U.S.C. §114(f)(2). In many respects, consolidation would require a single CARP to conduct two parallel proceedings under two different statutory

¹ XM and Sirius understand that Music Choice's new subscription service, Backstage Pass, is no longer operational. The demise of Backstage Pass appears to render moot Music Choice's request for consolidation and may also render moot the underlying issue raised in the Copyright Office's NOI. However, the NOI has not been withdrawn, and it is conceivable that other new subscription services may file notices of intent to participate and seek similar consolidation. Accordingly, XM and Sirius submit these comments.

standards, for two different time periods, in the extremely tight time frame allotted to a single CARP under a single standard.

In some respects, the §801(b)(1) standard and the willing buyer/willing seller standard overlap, but in other respects the standards are different. For example, the “disruptive impact” criterion of §801(b)(1) does not clearly apply to new subscription services. Further, similar evidence (e.g., as to the comparative contribution, investment, cost and risk criterion) arguably applies differently under the two standards. The Copyright Office should not order a consolidation that will blur these distinctions. Congress grandfathered the pre-existing satellite digital audio radio services under the §801(b)(1) standard to ensure that, having invested enormous resources in reliance on that standard, they would have the benefit of that standard. That benefit should not be diluted by the presence of other parties arguing over the very standard from which Sirius and XM were exempted by Congress.

Moreover, a consolidated proceeding would require substantial additional evidence simply because of the differences between the pre-existing services and new subscription services. The pre-existing services fall into two clearly defined types of services. The new subscription services are unknown and undefined. XM and Sirius know that there are no new satellite digital audio services and it is their understanding that there are no new cable radio services. Thus, any new subscription services that may exist use a completely different technology. Substantial expert testimony would be necessary to understand the technical capabilities, risks and complexities of that new technology. That added testimony would threaten to bog down a consolidated proceeding.

Separate proceedings would avoid these significant complications and minimize the risk of confusion. The Copyright Act permits an extraordinarily short period of time for completion of a CARP. A CARP is more likely to successfully complete its task if it is not overloaded with

information and with the need to hear cases under two different legal standards, applicable to different time periods.

For the reasons set forth above, XM and Sirius oppose the consolidation of the Pre-existing Services CARP with any New Subscription Services CARP the Office may convene.

Respectfully submitted,

XM SATELLITE RADIO, INC.

By: Lon Levin ^{cos}
 Lon C. Levin
 Senior Vice President
 1500 Eckington Place, N.E.
 Washington, D.C. 20002

Of Counsel:

Clifford M Harrington
 Barry H. Gottfried
 Cynthia D. Greer
 SHAW PITTMAN
 2300 N Street, N.W.
 Washington, DC 20006
 (202) 663-8000

SIRIUS SATELLITE RADIO INC.

By: Douglas A. Kaplan
 Douglas A. Kaplan
 Vice President and Deputy General Counsel
 Sirius Satellite Radio Inc.
 1221 Avenue of the Americas
 New York, NY 10020
 (212) 584-5100

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